

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

In Re: Complaint and Petition for Relief of)	
BellSouth Telecommunications, LLC d/b/a AT&T)	
Southeast d/b/a AT&T South Carolina v. Halo)	Docket No. 2011-304-C
Wireless, Inc. for Breach of the Parties')	
Interconnection Agreement)	

**REBUTTAL TESTIMONY OF MARK NEINAST
ON BEHALF OF AT&T SOUTH CAROLINA**

MARCH 23, 2012

1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME.**

3 A. Mark Neinast.

4 **Q. ARE YOU THE SAME MARK NEINAST WHO SUBMITTED DIRECT**
5 **TESTIMONY IN THIS MATTER ON FEBRUARY 24, 2012?**

6 A. Yes.

7 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

8 A. I will respond to some assertions in the rebuttal testimony of Halo witnesses Russ
9 Wiseman and Robert Johnson that relate to the issues I discussed in my direct testimony.
10 I will be selective, however, because I believe that much of what Halo's witnesses say
11 warrants no response.

12 **Q. WHY NOT?**

13 A. The AT&T South Carolina claims I discussed in my direct testimony are straightforward:
14 Halo is breaching the parties' ICA by sending AT&T South Carolina landline-originated
15 traffic, which the ICA does not permit, and by providing inaccurate call detail (at least
16 until December 29, 2011). To decide those claims, the Commission must answer only a
17 few questions,

18 The first question is whether Halo is sending AT&T South Carolina calls that are
19 made by calling parties using landline equipment, and the answer to that question is
20 "yes." Given that, the only defense Halo has asserted is that all of those landline-
21 originated calls are converted into wireless-originated calls when they pass through

1 Transcom, because Transcom, according to Halo, is an Enhanced Service Provider
2 (“ESP”) that terminates every call that comes its way and then originates a further
3 communication to AT&T South Carolina.

4 In considering Halo’s defense, the Commission must answer two additional
5 questions: (i) whether Transcom is an Enhanced Service Provider (“ESP”), as Halo
6 contends, and (ii) if Transcom is an ESP, does that mean it originates every call that
7 passes through its equipment, as Halo also contends? If the answer to either of those
8 questions is “no” (and AT&T South Carolina maintains that the answer to *both* questions
9 is “no”) the Commission must conclude that Halo has breached its contract with AT&T
10 South Carolina.

11 Mr. Wiseman and Mr. Johnson discuss many things that it seems to me have no
12 bearing on any of those questions. I suspect this may be because Halo has decided to
13 throw as many things at the wall as it can think of to see if anything sticks. In any event,
14 I will devote little space to assertions of Halo’s witnesses that are not pertinent to the
15 issues the Commission must decide, though I will identify examples of such assertions
16 and explain why they are irrelevant.

17 **Q. WHAT ARE THE ANSWERS TO THE THREE QUESTIONS YOU IDENTIFIED**
18 **ABOVE?**

19 A. There is no disagreement about the answer to the first question: Our call studies
20 conclusively demonstrate that Halo is sending AT&T South Carolina substantial volumes
21 of landline-originated traffic. I indicated in my direct testimony that Halo would quibble
22 about our numbers, and Halo does so in Mr. Wiseman’s testimony. I respond briefly to
23 those quibbles. At the end of the day, however, they make no difference, because Halo

1 does not deny it is delivering significant amounts of traffic that originate on landline
2 equipment, and for purposes of this case, it does not matter exactly what percentage of
3 Halo's traffic is landline-originated.

4 The question then becomes whether Transcom is an ESP and, if it is, whether that
5 means that every call that passes through Transcom on its way to AT&T South Carolina
6 is re-originated by Transcom. As I stated in my direct testimony, those are ultimately
7 legal questions. Halo has chosen to set forth its legal arguments in its testimony. As a
8 result, much of Mr. Wiseman's testimony is really a legal brief that Mr. Wiseman recites
9 "on the advice of counsel."¹ AT&T South Carolina will not adopt this approach, but
10 instead will present its legal arguments in its legal briefs. To give the Commission some
11 sense of AT&T South Carolina's position on the legal issues, however, I will make a few
12 general points "on the advice of counsel."

13 **Q. ARE THERE OTHER REASONS THAT YOUR REBUTTAL TESTIMONY IS**
14 **LIMITED?**

15 A. Yes. My direct testimony addresses many of the points that Halo's witnesses make in
16 their rebuttal. In a number of instances, I will respond to Halo's testimony by referring
17 the Commission to my direct testimony.

¹ There are at least 33 instances in which Mr. Wiseman explicitly states that he is expressing a view of the law on the advice of counsel. Pre-Filed Rebuttal Testimony of Russ Wiseman on Behalf of Halo Wireless, Inc. ("Wiseman Rebuttal") at 6:22, 10:10, 10:13, 14:6, 14:9, 15:15; 16:15, 16:16, 17:2, 17:3, 17:8, 17:11, 17:13, 18:19, 18:20, 19:16, 19 n.13, 19 n. 15, 20:1, 20:8, 20:15, 20:17, 21 n.14, 23:22, 24 n.20, 37:16, 39 n.25, 47:17, 48:1, 48:8, 49:32, 64 n.39. In addition, there are numerous instances in which the context makes clear that an assertion made by Mr. Wiseman is based on the advice of counsel, though that is not stated explicitly (perhaps because the references to counsel were becoming too repetitive). *E.g.*, *id.* at 10:19, 14:12, 20:6.

1 **Q. HOW IS YOUR REBUTTAL TESTIMONY ORGANIZED?**

2 A. This introductory discussion is followed by five more sections. Section II responds to
3 two over-arching assertions made by Mr. Wiseman. Section III further demonstrates that
4 much of the traffic Halo is delivering to AT&T South Carolina originates on landline
5 equipment. Sections IV and V address Halo’s defense that Transcom is an ESP that re-
6 originates all the calls that pass through it on the way to AT&T South Carolina – but
7 briefly, because this is predominantly a legal issue that will be addressed by our attorneys
8 in briefs. Finally, Section VI addresses Halo’s improper alteration of call detail.

9 **Q. WILL YOU RESPOND TO THE SECTION OF MR. JOHNSON’S TESTIMONY**
10 **STARTING ON PAGE 38 THAT IS EXPLICITLY DIRECTED AT YOUR**
11 **DIRECT TESTIMONY?**

12 A. To the extent that the assertions Mr. Johnson makes in that section are pertinent, I discuss
13 them as they arise in connection with the various subjects I discuss below. Again,
14 though, not all of Mr. Johnson’s assertions warrant a response. For example, I do not
15 think the Commission will be enlightened by further discussion of whether Transcom is
16 properly characterized as an “aggregator of traffic,”² or about whether “collaborators” is
17 an accurate characterization of the Halo/Transcom relationship.³

² Pre-filed Rebuttal Testimony of Robert Johnson on Behalf of Transcom Enhanced Services (“Johnson Rebuttal”), at 38, line 20 – 21, line 39.

³ *Id.* at 39, lines 14-17.

1 **II. OVERARCHING POINTS**

2 **Q. MR. WISEMAN BEGINS BY SAYING THAT THE ASSERTIONS IN YOUR**
3 **DIRECT TESTIMONY ARE “FOUNDED ON TRADITIONAL**
4 **INTERPRETATIONS AND APPLICATIONS OF THE TERMS ‘WIRELESS’**
5 **AND ‘ORIGINATED.’”⁴ HOW DO YOU RESPOND?**

6 A. The terms “wireless” and “originated” mean exactly the same thing today as they have
7 “traditionally” meant, and Mr. Wiseman does not say anything that suggests otherwise.
8 To be sure, technology has changed, and the changes include new applications of
9 wireless and landline equipment. But those new applications do not change the meaning
10 or use of the terms “wireless” and “originated.” Mr. Wiseman’s observation that my
11 assertions are founded on traditional views of those two terms, therefore, is an
12 acknowledgment that AT&T South Carolina’s position in this case is soundly based on
13 well-settled principles.

14 **Q. MR. WISEMAN ALSO ASSERTS THAT “AT&T IS ASKING THE**
15 **COMMISSION TO ASSUME AWAY HOW THE INDUSTRY ACTUALLY**
16 **OPERATES TODAY, HOW CURRENT TECHNOLOGY CAN BE USED AND IS**
17 **USED, AND MOST IMPORTANT, THE WAY THAT USERS ARE ACTUALLY**
18 **EMPLOYING THIS TECHNOLOGY TO COMMUNICATE.”⁵ IS THAT**
19 **CORRECT?**

⁴ Wiseman Rebuttal at 3, lines 17-18.

⁵ *Id.* at 4, lines 10-12.

1 A. No. AT&T South Carolina is asking the Commission to apply the rules that have been in
2 effect since Halo started delivering traffic to AT&T, and that are still in effect today, to
3 traffic that is subject to those current rules. Halo's real grievance seems to be that the
4 rules have not kept up with technology, at least in Halo's opinion. For example, Mr.
5 Wiseman states, "We also do not believe that the industry can continue to rely on the
6 'calling party number' as some indicator of where and on what network a call started."⁶
7 Perhaps the industry some day will adopt a new means of determining where a call
8 originates, as Mr. Wiseman evidently believes it should. But as Mr. Wiseman's
9 statement acknowledges, the entire industry today relies on CPN as the most reliable
10 indicator of where and on what network a call originated. As a result, Mr. Wiseman's
11 contention that AT&T South Carolina's call studies are faulty because they relied on
12 CPN is simply wrong.

13 Furthermore, Mr. Wiseman's ruminations on new technology and Halo's lofty
14 aspirations about promoting the "growth of low cost, high value IP communication
15 services for all Americans"⁷ relate only to a red herring – namely, Halo's contention that
16 some of what appears to be landline-originated traffic that Halo delivers to AT&T may
17 actually originate on wireless devices using IP-based services like GoogleVoice and
18 Skype. As I discussed in my direct testimony and briefly reiterate below, that contention
19 goes nowhere, because it is inconsistent with current industry standards for identifying
20 the origins of traffic *and* even if it were correct, all that would mean is that about 58% of

⁶ *Id.* at 25, lines 18-20.

⁷ *E.g., id.* at 4, line 10 - 5, line 8.

1 the traffic Halo is sending AT&T South Carolina is landline-originated, rather than the
2 approximately 66% our initial numbers showed.⁸

3 **III. HALO IS DELIVERING LANDLINE-**
4 **ORIGINATED TRAFFIC TO AT&T SOUTH CAROLINA.**
5

6 **Q. YOU SAID IN YOUR INTRODUCTORY COMMENTS THAT EVEN THOUGH**
7 **THE ICA REQUIRES HALO TO SEND ONLY WIRELESS-ORIGINATED**
8 **TRAFFIC TO AT&T SOUTH CAROLINA, HALO DOES NOT DENY THAT IT**
9 **IS SENDING AT&T TRAFFIC THAT ORIGINATES AS LANDLINE TRAFFIC.**
10 **WHAT DO YOU BASE THAT ON?**

11 A. It is not just that Halo does not deny that it is sending us landline-originated traffic; Mr.
12 Wiseman actually admits it. He states, “Most of the calls probably did start on other
13 networks before they came to Transcom for processing. It would not surprise me if some
14 of them started on the PSTN.”⁹ The PSTN is the public switched telephone network –
15 the landline network. So, even though Mr. Wiseman purposefully understated what he
16 was saying, he is still admitting that Halo is sending AT&T traffic that started as landline
17 traffic.

18 This clearly is landline-originated traffic, and sending landline-originated traffic
19 to AT&T (as Halo admittedly does) violates Halo’s contractual commitment to send *only*
20 “wireless-originated” traffic to AT&T.

⁸ Direct Testimony of Mark Neinast on Behalf of AT&T South Carolina (“Neinast Direct”), at 18, line 18 - 20, line 16,

⁹ Wiseman Rebuttal at 19, lines 9-10.

1 **Q. WHY DO YOU SAY MR. WISEMAN UNDERSTATED WHAT HE WAS**
2 **SAYING?**

3 A. In the first place, it is not “most” of the calls that started on other networks; it is *all* of
4 them. Transcom has no end user customers.¹⁰ Consequently, 100% of the calls that
5 Transcom hands off to Halo “start on other networks.” Second, Mr. Wiseman’s
6 statement that it “would not surprise [him] if some of them started on the PSTN” is as
7 much an understatement as “it would not surprise me if the sun rose tomorrow.” As Mr.
8 Wiseman admits, “Halo is not in a position to determine where or on what network the
9 call started, and we have not asked our customer.”¹¹ In other words, Halo is doing
10 nothing to try to avoid receiving landline-originated calls and delivering them to AT&T
11 South Carolina, and Mr. Wiseman knows, and effectively admits, that of the more than
12 14.5 million minutes of traffic Halo is delivering to AT&T South Carolina every month,¹²
13 a substantial portion necessarily originates on the PSTN.

14 **Q. WHY IS HALO’S ADMISSION IMPORTANT?**

15 A. Because it confirms that Halo’s critiques of our call studies that showed that Halo is
16 sending us landline-originated traffic is a side-show. At the end of the day, all Halo’s
17 critiques amount to is nit-picking about whether the percentage of Halo traffic that is
18 landline-originated is around 66%, as our studies showed, or something less than that.
19 For purposes of this case, though, the exact percentages are beside the point; all that

¹⁰ *See, e.g.,* Johnson Rebuttal, at 12-14.

¹¹ *Id.* at 19, lines 13-14.

¹² *See* Direct Testimony of J. Scott McPhee on Behalf of AT&T South Carolina (“McPhee Direct”), at 5, lines 18-19.

1 matters is that Halo is breaching its contract by sending us substantial amounts of traffic
2 that originates on landline equipment.¹³ The *only* defense left to Halo is its argument that
3 all the calls it is delivering to AT&T South Carolina are actually wireless calls originated
4 by Transcom's equipment in South Carolina, including all the calls that start out as
5 regular landline calls in other states.

6 **Q. WITH THAT UNDERSTANDING, WILL YOU NONETHELESS ADDRESS**
7 **SOME OF MR. WISEMAN'S CRITIQUES OF AT&T SOUTH CAROLINA'S**
8 **CALL STUDIES?**

9 A. I will, briefly, but bear in mind that even if some or all of Mr. Wiseman's critiques were
10 well-founded, that would have no effect on the ultimate result in this proceeding. Also
11 bear in mind that Halo has offered no traffic study of its own to dispute the results of
12 AT&T South Carolina's traffic analysis – even though Halo has access to all the
13 supporting data for AT&T South Carolina's analysis.

14 **Q. ONE PRELIMINARY QUESTION ABOUT THE CALL STUDIES, BEFORE WE**
15 **TURN TO MR. WISEMAN'S CONTENTIONS. AT PAGES 14-15 OF HIS**
16 **REBUTTAL TESTIMONY, MR. MCPHEE PROVIDES SOME INFORMATION**
17 **ABOUT THE CALL STUDIES BASED ON INPUT HE RECEIVED FROM YOU**
18 **AND YOUR COLLEAGUE, MR. MENSINGER. HAVE YOU REVIEWED THAT**
19 **PORTION OF MR. MCPHEE'S REBUTTAL TESTIMONY?**

20 A. Yes.

¹³ For additional discussion of this point, see my direct testimony at p. 17, line 15 - p. 18, line 2.

1 **Q. IS IT ACCURATE?**

2 A. Yes.

3 **Q. MR. WISEMAN ARGUES THAT AT&T SOUTH CAROLINA’S CALL STUDY**
4 **IMPROPERLY RELIED ON CALLING PARTY NUMBERS (“CPN”) TO**
5 **DETERMINE THE ORIGINATING CARRIER FOR CALLS. IS THAT A**
6 **VALID CRITICISM?**

7 A. No.

8 **Q. WHY NOT?**

9 A. Mr. Wiseman relies on services like Skype or GoogleVoice to discuss scenarios where,
10 according to him, the CPN would not accurately reflect the network that a call started
11 on.¹⁴ He asserts that AT&T South Carolina’s call analysis would have treated such calls
12 as landline even though, in theory, they could have originated on a wireless device using
13 an IP application. Such calls, Halo says, may signal a “wireline” number of a company
14 like Level 3 or Bandwidth.com, even though the person that originated the
15 communication did so on a wireless device. To the extent that AT&T South Carolina’s
16 analysis counts such calls as landline-originated, Mr. Wiseman argues, we have
17 overstated the percentage of landline-originated calls. Mr. Wiseman also claims (at 4),
18 without providing any facts in support, that the number of such hypothetical calls is
19 “huge.” (I say “hypothetical” because Mr. Wiseman offers no evidence that Halo is
20 actually sending AT&T any such calls.)

¹⁴ Wiseman Rebuttal at, *e.g.*, 4, 27-28.

1 My direct testimony addresses these points and explains why Mr. Wiseman is
2 wrong. The simple fact of the matter is that under current industry standards, the
3 determinant of whether a carrier is landline or wireless is the LERG. When our analysis
4 treated a call as landline-originated, that means that the carrier who holds the originating
5 NPA-NXX for that call identified the NPA-NXX as landline. Thus, our analysis
6 complied with industry standards, and properly treated as landline-originated a call that
7 originated on wireless equipment only when the holder of the NPA-NXX for that call
8 identified the NPA-NXX as landline.¹⁵

9 As I also explained in my direct testimony, we re-ran our numbers making the
10 ultraconservative assumption that all calls that showed originating numbers belonging to
11 Level 3 or Bandwidth.com originated on wireless equipment, and all that did was slightly
12 reduce the percentage of calls that were landline-originated.¹⁶

13 **Q. MR. WISEMAN CLAIMS THAT THE FCC SAID IN PARAGRAPHS 934, 960**
14 **AND 962 OF ITS *CONNECT AMERICA FUND* ORDER THAT CPN IS AN**
15 **UNRELIABLE INDICATOR OF WHERE CALLS ACTUALLY BEGAN.¹⁷ DOES**
16 **THIS CAST ANY DOUBT ON YOUR CALL ANALYSIS?**

17 **A.** No, for several reasons. Let's look first at what the FCC actually said in the three
18 paragraphs of *Connect America Fund*¹⁸ that Mr. Wiseman cites. In that Order, the FCC,

¹⁵ Neinast Direct at 18, line 19 - 19, line 4.

¹⁶ *Id.* at 19, line 6 - 20, line 3.

¹⁷ Wiseman Rebuttal at 25, lines 12-13.

¹⁸ *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011).

1 among other things, “adopt[ed] a prospective intercarrier compensation framework for
2 VoIP traffic.”¹⁹ In its discussion of that new framework, the FCC said:

3 [G]iven the recognized concerns with the use of telephone
4 numbers and other call detail information to establish the
5 geographic endpoints of a call, we *decline to mandate*, their use in
6 that regard We do, recognize concerns regarding providers’
7 ability to distinguish VoIP-PSTN traffic from other traffic, and . . .
8 we permit LECs to address this issue through their tariffs, much as
9 they do with jurisdictional issues today.²⁰

10 As it continued its discussion of the prospective intercarrier compensation
11 framework for VoIP-PSTN traffic, the FCC repeated that point two more times, stating,
12 “Because telephone numbers and call detail information *do not always* reliably establish
13 *the geographic endpoints of a call*, we do not mandate their use,”²¹ and, “[W]e *do not*
14 *require* the use of particular call detail information to dispositively distinguish toll VoIP-
15 PSTN traffic from other VoIP-PSTN traffic, given the recognized limitations of such
16 information.”²²

17 This is hardly the condemnation of CPN that Mr. Wiseman claims to find in the
18 FCC’s Order. All the FCC actually said is that it was not *requiring* the use of CPN, in
19 the context of its new, going-forward intercarrier compensation scheme for VoIP-PSTN
20 traffic, because of concerns that CPN does *not always* reliably establish *the geographical*
21 *endpoints of a call*. The FCC neither condemned nor prohibited the use of CPN, even for
22 VoIP-PSTN traffic; it did not say anything about the reliability of CPN with respect to

¹⁹ *Id.* ¶ 933.

²⁰ *Id.* ¶ 934 (emphasis added).

²¹ *Id.* ¶ 960 (emphasis added).

²² *Id.* ¶ 962 (emphasis added).

1 traffic (like much of Halo's traffic) that is *not* VoIP-PSTN traffic; and, most important, it
2 did not say anything about the use of CPN to identify whether a call originated on a
3 landline or wireless network (as opposed to identifying the geographic endpoints of a
4 call).

5 Recall that the purpose of my call analysis was to confirm that Halo is sending
6 AT&T South Carolina landline-originated traffic in breach of the parties' ICA. As I have
7 explained, CPN is a very reliable tool for identifying the carrier that originated calls and
8 thereby determining whether the call was landline-originated. Moreover, I already
9 accounted for Mr. Wiseman's claim that some IP calls may appear to be landline when
10 they actually are wireless. While I dispute that claim, the re-run of our analysis,
11 discussed above, shows that even if Mr. Wiseman were correct, it would have very little
12 impact on the final result, and certainly would not prove that Halo is not sending
13 significant volumes of landline-originated traffic to AT&T South Carolina.

14 **Q. IS IT TRUE, AS MR. WISEMAN STATES, THAT "THE AT&T WITNESSES**
15 **HAVE ALSO ADMITTED THAT THEY HAVE NO REAL WAY OF**
16 **ACCURATELY IDENTIFYING WHETHER A PARTICULARLY CALL**
17 **ACTUALLY 'ORIGINATED' FROM A 'WIRELINE' CUSTOMER OF AN LEC**
18 **USING A TRADITIONAL PHONE"**²³?

19 **A.** No. All we have "admitted" – and I will quote my direct testimony on this – is that "the
20 NPA-NXX does not in each and every instance accurately reflect actual geographical

²³ Wiseman Rebuttal at 4, lines 3-4.

1 location.”²⁴ I then went on to say: “Nonetheless, NPA-NXX is the most reliable
2 indicator we have in the telecommunications industry; it is accurate for the vast majority
3 of calls; and it is the standard, accepted practice in the industry to use NPA-NXX as a
4 proxy for geographic location of landline calls.”²⁵ Our study demonstrated beyond any
5 doubt that a substantial portion of the calls Halo is delivering to us originated on landline
6 equipment, in breach of our interconnection agreement.

7 **Q. WHAT IS YOUR CONCLUSION CONCERNING THE QUESTION WHETHER**
8 **HALO IS SENDING AT&T SOUTH CAROLINA TRAFFIC THAT ORIGINATES**
9 **ON LANDLINE EQUIPMENT?**

10 A. As I said at the outset, that is not really a question at all. Halo admits it is sending us
11 traffic that started out on the PSTN. Notwithstanding its contract obligation, Halo is
12 doing nothing to avoid sending us such traffic; Halo admits it “is not in a position to
13 determine where or on what network the call started,” and that it has “not asked our
14 customer.”²⁶ Our call studies showed that about two thirds of the traffic is landline-
15 originated. Giving Halo every benefit of the doubt, the fraction may be a bit less than
16 that, but for purposes of this case, that makes no difference.

²⁴ Neinast Direct at 21, lines 5-6.

²⁵ *Id.* at 21, lines 6-9.

²⁶ *Id.* at 19, lines 13-14.

1 **IV. TRANSCOM IS NOT AN ESP.**

2 **Q. PLEASE RE-STATE HOW THE QUESTION WHETHER TRANSCOM IS OR IS**
3 **NOT AN ESP FITS INTO THE PARTIES' DISPUTE.**

4 A. As I explained in Section III above, Halo is sending AT&T South Carolina a substantial
5 amount of traffic that originates on landline networks. That means that Halo is breaching
6 the parties' ICA unless Halo can somehow persuade the Commission that all of that
7 traffic is "re-originated" when it hits Transcom. To establish that that is the case, Halo
8 must first show that Transcom is an ESP, because Halo's whole "re-origination" theory
9 rests on the proposition that Transcom is an ESP.

10 In my direct testimony, I noted that in *Connect America Fund*, the FCC, while
11 fully aware of Halo's contention that Transcom is an ESP, rejected precisely the
12 argument that Halo is advancing here;²⁷ Mr. McPhee discussed the FCC's rejection of
13 Halo's argument at greater length.²⁸ O.R.S. witness Rozycki also cites to *Connect*
14 *America Fund* on that same point.²⁹

15 I also explained that while the question whether Transcom is an ESP is ultimately
16 a legal question, I had seen no evidence that Transcom provides enhanced services as I
17 understand that term.³⁰ And I noted that the Tennessee Regulatory Authority ("TRA"), in
18 the parties' identical dispute there, recently concluded that Transcom is not an Enhanced

²⁷ Neinast Direct at 25, lines 1-11.

²⁸ McPhee Direct at 17, line 1 – 20, line 16.

²⁹ Direct Testimony of Christopher J. Rozycki ("Rozycki Direct"), at 8, lines 1-21.

³⁰ Neinast Direct at 27, line 11 – 28, line 11.

1 Service Provider, for reasons that track my own, to which I testified in Tennessee,³¹ and
2 that the Pennsylvania Public Utility Commission (“PPUC”) likewise ruled that
3 “Transcom’s removal of background noise, the insertion of white noise, [and] the
4 insertion of computer developed substitutes for missing content”.– essentially the same
5 functionalities Halo relies on here – do not constitute “enhancements.”³²

6 **Q. HOW DOES HALO RESPOND TO YOUR DISCUSSION OF THE TRA AND**
7 **PPUC RULINGS THAT TRANSCOM IS NOT AN ESP?**

8 A. Halo has no answer for the Tennessee decision or the Pennsylvania decision, so Mr.
9 Wiseman and Mr. Johnson completely ignore them.

10 Instead of addressing those adverse rulings, Mr. Johnson discusses at great length
11 what he calls Transcom’s “enhanced service platform,” starting with a discussion of
12 acoustical research in 1932 and the career of Dr. Harvey Fletcher from 1916-1949, and
13 including why Transcom developed its self-styled “enhanced services platform,” how
14 “non-enhanced voice telephony works,” how VoIP telephony works, how Transcom’s
15 “enhanced service platform” works, how Transcom’s customers connect to it, how they
16 determine the nature of their signaling, and on and on.³³ When all is said and done, Mr.
17 Johnson spends many pages discussing his “very technical understanding” of a very
18 simple (and decidedly non-enhanced) aspect of Transcom’s service.”³⁴

³¹ *Id.* at 28, line 13 – 30, line 2.

³² *Id.* at 30, lines 4-15

³³ Johnson Rebuttal at 5, line 9 – 19, line 19.

³⁴ *Id.* at 20, line 1.

1 **Q. WHAT IS THAT ASPECT OF TRANSCOM'S SERVICE?**

2 A. The bottom line is that all Transcom is doing is improving the audio quality of
3 transmissions.

4 **Q. IS IMPROVING THE AUDIO QUALITY OF TRANSMISSIONS THE**
5 **PROVISION OF ENHANCED SERVICES?**

6 A. No. For the reasons I discussed in my direct testimony, and that the TRA, and the PPUC
7 found conclusive, that is not the provision of enhanced services.

8 **Q. MR. JOHNSON STATES THAT HE IS CONFIDENT THAT ONCE YOU READ**
9 **HIS TESTIMONY, YOU WILL AGREE THAT TRANSCOM IS AN ESP.³⁵ NOW**
10 **THAT YOU HAVE READ HIS TESTIMONY, DO YOU AGREE THAT**
11 **TRANSCOM IS AN ESP?**

12 A. No, and since the TRA ruled that Transcom is not an ESP after seeing essentially the
13 same testimony from Mr. Johnson, I am surprised that Mr. Johnson thought I would agree
14 with him (particularly when his testimony does not even attempt to address the TRA's
15 ruling).

16 **Q. MR. JOHNSON TAKES YOU TO TASK FOR NOT ADDRESSING THE**
17 **BANKRUPTCY COURT RULINGS THAT HALO RELIES ON FOR THE**
18 **PROPOSITION THAT TRANSCOM IS AN ESP.³⁶ WHAT ABOUT THOSE**
19 **RULINGS.**

³⁵ *Id.* at 49, lines 9-11.

³⁶ *Id.* at 39, lines 23.

1 A. That is a question for the lawyers. Since Mr. Johnson insists, however, here is my
2 general understanding of AT&T's position: Just as this Commission is not bound by the
3 TRA's recent decision, or the PPUC decision, it also is not bound by the considerably
4 older bankruptcy court decisions. Instead, the Commission should attach weight to the
5 various decisions to the extent that it finds their analysis and reasoning persuasive. This
6 Commission is better equipped than a bankruptcy court, which seldom sees
7 telecommunications issues or deals with FCC Rules, to decide whether Transcom is an
8 ESP – and so were the TRA and the PPUC when they did not adopt the bankruptcy court
9 conclusion and ruled that Transcom is not an ESP. This point seems evident to me as a
10 layman, and was confirmed for me by the decision of the bankruptcy judge presiding
11 over Halo's own bankruptcy to allow this Commission and other state commissions to
12 determine the merits of these issues in the first instance. AT&T South Carolina believes
13 this Commission will find the reasoning of the two state commissions, especially the
14 TRA, persuasive.

15 Halo has suggested that AT&T is legally bound by the bankruptcy court
16 decisions, under a doctrine called "collateral estoppel." That is a legal issue that I cannot
17 address, but AT&T will show in its legal briefs why that is incorrect, and that if anyone
18 were legally bound here, it would be Halo, by the TRA decision on precisely the issues
19 presented here.

20 **Q. IS THE ICA AT ISSUE IN THIS CASE THE SAME ICA THAT WAS AT ISSUE**
21 **IN THE TRA DECISION YOU REFERENCE?**

22 A. Yes. The ICA that the TRA ruled Halo breached is the same ICA that is at issue here.
23 Thus, AT&T's claim that Halo breached that ICA has already been sustained.

1 **Q. IN ADDITION TO THE REASONS YOU HAVE ALREADY GIVEN, ARE**
2 **THERE ANY ADDITIONAL REASONS FOR YOUR CONCLUSION THAT**
3 **TRANSCOM IS NOT A PROVIDER OF ENHANCED SERVICES?**

4 A. Yes. On February 28 and 29, after my direct testimony was filed in this case, I attended
5 the evidentiary hearing in the parallel proceeding in Wisconsin. In the Wisconsin case, I
6 learned that none of Transcom's written marketing materials makes any mention of the
7 supposed "enhancements" that Transcom claims it provides, and that Transcom's
8 contracts with its customers also make no mention of any such enhancements, and do not
9 require Transcom to provide the enhancements. These facts support my view that
10 whatever Transcom is doing to the audio quality of the calls it processes is merely
11 incidental to the transmission of the underlying telecommunications services. I
12 understand from counsel that the FCC has made clear that services like Transcom's that
13 are merely incidental to a telecommunications service, and that do not alter the
14 fundamental character of the service, are not enhanced services. I am not asking the
15 Commission to take my word for that; as I indicated, AT&T South Carolina will discuss
16 the law in legal submissions.

17 **V. EVEN IF TRANSCOM WERE AN ESP, THAT DOES NOT**
18 **MEAN IT RE-ORIGINATES EVERY CALL IT TOUCHES.**

19 **Q. HAS HALO'S TESTIMONY PERSUADED YOU THAT THE LANDLINE-**
20 **ORIGINATED CALLS THAT HALO DELIVERS TO AT&T SOUTH**
21 **CAROLINA ARE RE-ORIGINATED AS WIRELESS CALLS WHEN THEY**
22 **PASS THROUGH TRANSCOM'S EQUIPMENT?**³⁷

³⁷ Neinast Direct at 23, line 4 – 24, line 2.

1 A. Not in the slightest. As I explained in my direct testimony, a call is originated only once,
2 by the person that actually starts the call – the girl in California in the illustration I gave.
3 Calls are analyzed on an end-to-end basis based on the originating caller’s (the girl’s)
4 NPA-NXX and the called party’s (the girl’s grandmother in Columbia) NPA-NXX. Just
5 as the FCC found when it rejected Halo’s position in *Connect America Fund*, Transcom’s
6 supposed “re-origination” of a call with wireless equipment “in the middle of the call
7 path does not convert a wireline-originated call [*i.e.*, a landline-originated call] into a
8 CMRS originated call.”³⁸

9 Bear in mind that Halo is not claiming that Transcom is originating these calls in
10 the usual sense of the word. Rather, Halo is claiming that because Transcom is an ESP,
11 Transcom (i) is exempt from access charges; (ii) is thus treated as an end user; and (iii) is
12 therefore a call originator. Once one decides, as the Commission should, that Transcom
13 is not an ESP, that is the end of the discussion – there is nothing left of Halo’s argument.

14 **Q. MR. WISEMAN OBJECTS TO YOUR USE OF THE TERM “RE-**
15 **ORIGINATION.” HE STATES THAT HALO IS NOT ARGUING THAT**
16 **TRANSCOM “RE-ORIGINATES” CALLS, BUT RATHER THAT AS AN ESP,**
17 **TRANSCOM “INITIATES A FURTHER COMMUNICATION.”³⁹ DO YOU**
18 **ACCEPT THE DISTINCTION HE IS MAKING?**

19 A. No. Halo is free to use whatever words it wishes in making its own arguments. I would
20 note, however, that the language in our ICA provides that Halo must send AT&T South

³⁸ See *id.* at 25, lines 1-11, quoting *Connect America Fund*.

³⁹ Wiseman Rebuttal at 7, lines 7-10.

1 Carolina only traffic that “*originates* through wireless transmitting and receiving
2 facilities.”⁴⁰ So if Halo insists that what Transcom is doing is *not* an origination, that
3 necessarily means that the origination happens at the start of the call – which AT&T of
4 course maintains is the one and only origination. Because that origination is not wireless
5 for most of the calls Halo delivers to AT&T, Halo clearly is breaching the ICA.

6 As Mr. Wiseman acknowledges, he insists on the phrase “initiates a further
7 communication” because that is the phrase the court used in the *Bell Atlantic* decision
8 when it talked about dial-up internet traffic terminating at the Internet Service Provider
9 (“ISP”), which then initiated a further communication to the World Wide Web.⁴¹ As
10 AT&T South Carolina will explain in its legal briefs, the *Bell Atlantic* decision does not
11 help Halo here, because, among other reasons, there is a tremendous difference between
12 the situation that case addressed and the situation presented here. For one thing, when an
13 ISP’s customer dials a seven-digit phone number to reach the ISP in order to go onto the
14 internet, the customer knows he is calling the ISP for that purpose. In contrast, when the
15 girl in California calls her grandmother in Columbia, the girl is not making a call to
16 Transcom; she does not even know Transcom exists. AT&T will explain the legal
17 significance of this important factual distinction in its briefs.

18 All that said, I do not believe it makes any difference whether we call it a “re-
19 origination,” a “second origination” or the “initiation of a further communication,”
20 because whatever we call it, Transcom does not do it.

⁴⁰ I refer to the ICA Amendment quoted in Mr. McPhee’s direct testimony, at 13, lines 5-12.

⁴¹ Wiseman Rebuttal at 7, line 15 – 8, line 2.

1 **Q. WHAT IF THE COMMISSION WERE TO DECIDE THAT TRANSCOM IS AN**
2 **ESP? WOULD IT FOLLOW THAT TRANSCOM IS ORIGINATING ALL**
3 **THESE CALLS, AS HALO CLAIMS?**

4 A. Not in my view, as I have explained.⁴² That is in large part a legal question, however,
5 which AT&T South Carolina will address in its briefs.

6 **Q. YOU SAY THAT THE FCC REJECTED HALOS' THEORY IN *CONNECT***
7 ***AMERICA FUND*, BUT STARTING AT PAGE 54 OF HIS TESTIMONY, MR.**
8 **WISEMAN SEEMS TO SUGGEST THAT IS NOT THE CASE. HOW DO YOU**
9 **RESPOND?**

10 A. Frankly, I am not certain exactly what position Halo is taking on the FCC's decision.
11 From my perspective, the most important statement in Mr. Wiseman's testimony about
12 the FCC's Order is this: "We acknowledge that . . . apparently the FCC now believes
13 ESPs are exchange access customers and *do not originate calls*."⁴³ With this
14 acknowledgment that the FCC believes ESPs do not originate calls, I do not see how
15 Halo can maintain its position that the calls we are discussing are not landline-originated
16 calls on the theory that Halo originates them.

17 **Q. BUT DOESN'T MR. WISEMAN QUALIFY HIS ACKNOWLEDGEMENT OF**
18 **THE FCC'S BELIEF?**

19 A. Yes. Mr. Wiseman, in the same sentence I just quoted, says that the FCC's belief that
20 ESPs do not originate calls results from the fact that the FCC has "thrown out all of the

⁴² Neinast Direct at 31, lines 1-11.

⁴³ *Id.* at 24, lines 11-12 (emphasis added).

1 prior precedent.” He also states that the fact that the FCC believes ESPs do not originate
2 calls “does not resolve the ‘end user’ question,” and does not mean that ESPs are
3 common carriers or provide telecommunications services.⁴⁴ As to the first point, AT&T
4 does not believe the FCC’s rejection of Halo’s position is a rejection of prior precedent;
5 rather, it is an application of prior precedent, as AT&T South Carolina will show in its
6 legal briefs. Scott McPhee also discusses this in his rebuttal testimony, at pages 7-9.

7 As for Mr. Wiseman’s second point, this Commission does not need to resolve the
8 “end user” question or decide whether Transcom is a common carrier or provides
9 telecommunications services in order to decide that Halo has breached the parties’ ICA
10 by sending AT&T landline-originated traffic. If Transcom is not originating calls, as
11 Halo acknowledges the FCC found, then all those landline-originated calls, like the girl’s
12 call to her grandmother, remain landline-originated and were delivered in breach of the
13 ICA.

14 **Q. ARE YOU GOING TO ADDRESS THE DISCUSSION OF *CONNECT AMERICA***
15 ***FUND* STARTING AT PAGE 54 OF MR. WISEMAN’S TESTIMONY?**

16 **A.** As in the direct testimony, Mr. McPhee will focus on the finer points of that decision. I
17 wanted to emphasize Halo’s acknowledgement that the FCC decided ESPs do not
18 originate calls.

⁴⁴ *Id.* at 24, lines 13-14.

1 **Q. MR. WISEMAN ANALOGIZES THE HALO-TRANSCOM ARRANGEMENT TO**
2 **A “LEAKY PBX.”⁴⁵ DOES THE ANALOGY SUPPORT HALO’S POSITION**
3 **HERE?**

4 A. No. The so-called “leaky PBX” situation arises when someone using a work phone or
5 home phone dials into her company’s PBX and then, usually by dialing an access code or
6 another number, has the PBX send the call to another company PBX via a private line
7 connection between the PBXs. The second PBX then “leaks” the call into the local
8 exchange for termination, and the call appears to be local (that is, it looks like it came
9 from the local PBX), so the LEC does not know to apply access charges.⁴⁶ Mr.
10 Wiseman’s comparison to a leaky PBX is telling, because the FCC long ago recognized
11 that leaky PBXs – just like Halo’s and Transcom’s current scheme – constituted a form of
12 “access charge avoidance” that needed correction.⁴⁷ The FCC dealt with the Leaky PBX
13 situation by imposing a \$25 per month surcharge on all jurisdictionally interstate special
14 access lines that do not fall within specific exceptions.

15 In any event, the Halo/Transcom arrangement, though similar in purpose to leaky
16 PBX, is different in important ways. Most important, in the leaky PBX situation the
17 person who originates the call knows she is using a company line and the company
18 remains responsible to pay for the line and the call. With Halo and Transcom, by
19 contrast, the party originating the call has no idea that Halo or Transcom will be involved

⁴⁵ Wiseman Rebuttal at 8, lines 10-15.

⁴⁶ *In the Matter of Amendment of Part 69 of the Commission’s Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd. 7441, ¶ 15 (rel. Dec. 18, 1987); NEWTON’S TELECOM DICTIONARY at 426 (18th ed.) (definition of “Leaky PBX”).

⁴⁷ *MTS and WATS Market Structure*, 97 FCC Rcd. 682, ¶ 87 (1983).

1 in carrying the call and Halo and Transcom have no contractual or other relationship with
2 that caller.

3 **Q. MR. JOHNSON FAULTS YOU FOR CHARACTERIZING TRANSCOM AS A**
4 **CARRIER.⁴⁸ YOUR RESPONSE?**

5 A. As a matter of fact, Mr. Johnson spends three pages arguing that Transcom does not fit
6 within the legal definition of “carrier,” based primarily on what he says he has been told
7 by counsel.⁴⁹ That argument, though, is merely a round-about way of restating Halo’s
8 contention that Transcom is an ESP and, therefore, an end-user that originates
9 communications. Assuming the Commission rejects that argument, as it should, the
10 Commission will have no occasion to decide whether Transcom is a carrier. That said,
11 inasmuch as Transcom is not, in my view, an ESP, I continue to believe that Transcom is
12 a carrier.

13 **VI. HALO PROVIDED INACCURATE CALL DETAIL.**

14 **Q. IN YOUR DIRECT TESTIMONY, YOU SHOWED THAT HALO HAS**
15 **INSERTED CHARGE NUMBER (“CN”) DATA IN A MANNER THAT MAKES**
16 **TOLL CALLS APPEAR TO BE LOCAL, APPARENTLY SO HALO COULD**
17 **AVOID PAYING THE APPLICABLE ACCESS CHARGES. DOES HALO**
18 **ADMIT DOING THIS?**

⁴⁸ Johnson Rebuttal at 39, lines 7-13.

⁴⁹ *Id.* at 23, line 10 – 26, line 7.

1 A. Yes. As I discussed, when used legitimately, a Charge Number (“CN”) appears on a very
2 small number of calls and is typically within the same NPA-NXX as the Calling Party’s
3 Number. Halo, however, inserted what it alleges is a Transcom CN on *all* of the calls it
4 was sending to AT&T South Carolina, even though the calling party had not asked or
5 arranged to have a CN inserted. Mr. Wiseman admits Halo did this, saying that Halo
6 “populate[d] the CN address signal with the BTN of our end user customer”⁵⁰ Of
7 course, the so-called “end user customer” here is Transcom, *not* the actual party that
8 originated the call or anyone affiliated with that party (such as his or her employer). I am
9 aware of no legitimate reason to insert CN in this manner. Halo has stated that it stopped
10 inserting the Transcom CN as of December 29, 2011, but that does not remove Halo’s
11 prior, and significant, breach of the ICA.

12 **Q. MR. WISEMAN, HOWEVER, STATES THAT HALO INSERTED THE**
13 **TRANSCOM CN INTO THE CALL DETAIL “SO HALO COULD CORRECTLY**
14 **BILL SERVICES, AND ASSOCIATE ITS CUSTOMER CALLS TO**
15 **TERMINATING LECS, WHERE DIFFERENT TERMINATING CHARGES ARE**
16 **IN EFFECT.”⁵¹ IS THAT A PERSUASIVE EXPLANATION?**

17 A. I do not believe it is. I cannot imagine why Halo would need to insert a Transcom CN
18 into the call detail in order for Halo to correctly bill Transcom, which is its only
19 customer. And I have no idea what Mr. Wiseman means when he says Halo inserted the

⁵⁰ Wiseman Rebuttal at 31, lines 15-16.

⁵¹ *Id.* at 33, lines 1-3.

1 CN so Halo could “associate its customer [Transcom] calls to terminating LECs, where
2 different terminating charges are in effect.” That makes no sense to me.

3 **Q. YOU SAY THAT HALO WAS DISGUIISING THE TRUE NATURE OF ITS**
4 **TRAFFIC, BUT WASN’T AT&T SOUTH CAROLINA ABLE TO DISCERN THE**
5 **TRUE NATURE OF THE TRAFFIC BY LOOKING AT THE ORIGINATING**
6 **CPN AND USING THE PROCESS YOU AND MR. MENSINGER USED FOR**
7 **YOUR CALL ANALYSES?**

8 A. Yes, but that isn’t the point. As I explained in my direct testimony,⁵² Halo was
9 disguising the true nature of its traffic *from our billing systems*. That is where the breach
10 of ICA and conflict with industry practices occurred.

11 **Q. BUT MR. WISEMAN SAYS THAT AT&T’S BILLING SYSTEMS COULD NOT**
12 **POSSIBLY HAVE BEEN DECEIVED, BECAUSE AT&T SOUTH CAROLINA**
13 **DOES NOT DO “CALL BY CALL” RATING.⁵³ HOW DO YOU RESPOND?**

14 A. It is true that AT&T South Carolina does not bill Halo by identifying each individual call
15 as local or long distance and billing accordingly; rather, AT&T South Carolina bills
16 carriers with CMRS ICAs, such as Halo, according to factors – in this instance, the 100%
17 intraMTA factor that Halo gave AT&T South Carolina (*i.e.*, Halo’s representation that all
18 of Halo’s traffic is intraMTA wireless traffic). What Mr. Wiseman overlooks, however,
19 is that the ICA allows the factor to be adjusted from time to time to reflect real world
20 traffic flows, and by inserting the Transcom CN into the call detail, Halo caused the

⁵² Neinast Direct at 34, line 16 - 35, line 2.

⁵³ *Id.* at 32, lines 12-13.

1 billing records to give the inaccurate impression that all of Halo's traffic was indeed
2 intraMTA traffic. That, under other circumstances, would have deterred AT&T from
3 seeking to adjust the billing factors. It was only because our suspicions were aroused and
4 we checked the SS7 records (as opposed to the billing records) that we were able to
5 confirm that Halo was in fact sending us a great deal of traffic that was not intraMTA.

6 **Q. HAS THE FCC RECOGNIZED THAT INSERTING A CN INTO THE CALL**
7 **RECORD, AS HALO DID, CAUSES PROBLEMS FOR TERMINATING**
8 **CARRIERS?**

9 A. Yes. In *Connect America Fund*, the FCC addressed the practice of manipulating CN that
10 is sent to a terminating carrier. The FCC referred to this as "the problem of CN number
11 substitution that disguises the characteristics of traffic to terminating carriers," and found
12 that "CN substitution is a technique that leads to phantom traffic."⁵⁴ The FCC therefore
13 stated that "the CN field may only be used to contain a calling party's charge number,
14 and that it may not contain or be populated with a number associated with an
15 intermediate switch, platform, or gateway, or other number than a calling party's charge
16 number."⁵⁵ Yet that is precisely what Halo did.

17 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

18 A. Yes.

⁵⁴ *Connect America Fund*, ¶ 714.

⁵⁵ *Id.*

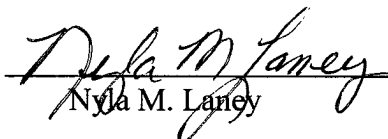
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